COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT for SUFFOLK COUNTY

No. _____

_____

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.,
Appellant,

v.

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY,
Appellee.

_____

ON APPEAL FROM A RULING OF LAW BY THE
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

_____

PETITION FOR APPEAL PURSUANT TO G.L. c. 25, § 5

_____

AT&T Communications of New England, Inc., ("AT&T") appeals from an order issued by the Department of Telecommunications and Energy (the "Department") on January 30, 2004, numbered D.T.E. 98-57 Phase III-D (the "Phase III-D Order"). This appeal is brought pursuant to G.L. c. 25, § 5. A copy of the Department's Phase III-D Order is attached hereto as Exhibit A.

Issue on Appeal

1. The sole question on appeal is an important question of law: whether the Department erred in holding that its broad power to regulate certain intrastate

telecommunications services under Massachusetts law has been preempted merely because the Federal Communications Commission (the "FCC") opted not to regulate such services under federal law.

Procedural and Legal Background

Telephone Regulation Is Shifting From Legally Protected Monopolies to Local Competition, Including Competitive Wholesale Access to the Incumbent's Local Network.

2. As this Court has observed, prior to the mid-1990s "telecommunications regulation envisioned natural monopolies predicated on one-wire, one-carrier systems." Roberts v. Southwestern Bell Mobile Systems, Inc., 429 Mass. 478, 479 (1999).

3. In January 1995, the Department began to explore ways to break this monopoly and bring competition to the market for local telecommunications services by opening an investigation into, among other issues, whether Verizon (then NYNEX) should be required to unbundle elements of its local network and lease them at wholesale rates to new entrants that would use them to provide competing retail services. D.P.U. 94-185, Vote to Open Investigation at 3-5 (Jan. 6, 1995).

4. Thirteen months later Congress decided to pursue the same policy goals through the Telecommunications Act of 1996 (the "TCA"). The TCA requires incumbent local

exchange carriers ("ILECs") like Verizon to provide access to unbundled network elements whenever failure to do so would impair the ability of competitive local exchange carriers ("CLECs") to enter the local exchange market and provide competitive service. See 47 U.S.C. §§ 251(c)(3) and 251(d)(2).

5. Congress took considerable pains to ensure that the regulatory authority of state commissions like the Department was preserved when it passed the TCA. Thus, the TCA expressly authorizes the States to impose additional requirements upon telecommunications carriers in order to further competition so long as those requirements are "not inconsistent with" federal rules. For example, 47 U.S.C. §§ 251(d)(3) provides that States may enforce regulations, orders, or policies that establish additional access and interconnection obligations on ILECs like Verizon so long as they are consistent with the requirements of § 251 and do not prevent implementation of the pro-competitive purposes of the TCA. In addition, 47 U.S.C. § 261(c) states that "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange

service or exchange access, as long as the State's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part."

The Technology Behind the Substantive Issues that the Department Declined to Address.

6. To understand the issues that the Department was asked to address in this proceeding, but that it declined to investigate or decide on the ground that its power to do so has been preempted by FCC action, some background is useful. However, the Department never reached any of the substantive issues described below, and none of them must (or even should) be addressed on appeal. The sole issue on appeal is whether the Department's finding on preemption grounds that it could not consider these issues was in error. This is a pure question of law.

7. In a traditional telephone network, a person's telephone is connected to the telephone company's local switch by a series of wires known as the "loop." All of the loops serving customers in a fairly large area run to an ILEC building known as a "wire center," where the loops are connected to a local switch that sets up and completes regular voice telephone calls.

8. As a general matter, under federal law and rules promulgated by the FCC, Verizon and other ILECs must

"unbundle" the loop and permit competitors to use it on a wholesale basis at rates that are based on forward-looking economic cost. Such "unbundling" often involves the disconnection of the loop from the ILEC switch in the wire center and the reconnection of it to another carrier's equipment installed in leased space in the ILEC's wire center.

9. The popular data service called Digital Subscriber Line ("DSL"), which many people now use to access the Internet, carries data traffic using analog signals in the high-frequency portion of the loop, while permitting regular voice traffic to be carried with analog signals using lower frequencies as it always has been. With DSL, at some point the voice signal must be split from the data signal. Today this typically takes place in the ILEC's wire center. After being split the voice signal is sent to the ILEC's local circuit switch just as it always has been, and the data signal is converted into digitized packets of information that may then be routed onto and through the Internet.

10. Verizon is in the process of reconfiguring its network architecture to move these splitting and routing functions out of its wire centers to facilities in the field called Remote Terminals. Under Verizon's new

network architecture, upgraded Remote Terminals would: (i) split the voice and data signals of customers using DSL; (ii) send the voice signals to the wire center using so-called Digital Loop Carrier ("DLC") technology; and (iii) convert the data signals into the same kind of packets of digitized information that are sent over the Internet, and send the data packets to the wire center separately using Asynchronous Transfer Mode ("ATM") technology.

11. Verizon has proposed a new wholesale service that would permit other carriers to access DSL data traffic carried over this new network architecture. Verizon calls this new service offering Packet At Remote Terminal Service ("PARTS"). Under PARTS, Verizon would deliver data traffic to the wholesale customer via an ATM port located at the Verizon wire center.

Procedural History

12. On May 24, 2002, the Department reopened Phase III of Docket 98-57 to examine Verizon's PARTS proposal and its implications for local exchange competition in Massachusetts.

13. The Department also sought comments regarding the appropriate scope of its investigation. AT&T urged the Department not only to investigate the appropriate

terms and conditions for Verizon's PARTS proposal to access packetized data signals, but in addition to explore whether voice signals could also be packetized at the Remote Terminal and delivered to CLECs via an ATM port at the Verizon wire center. AT&T explained that packetizing voice signals and delivering them to CLECs in this manner holds the promise of doing much to promote competition in the local exchange market, because it would greatly simplify the manner in which CLECs could receive voice signals when they lease unbundled loops from Verizon.

14. Initially, the Department agreed with AT&T regarding the proper scope of its investigation. On October 18, 2002, the Department ruled that it would investigate and address both: (i) the ability of CLECs to obtain non-discriminatory access to loops under Verizon's new network architecture; and (ii) the feasibility of Verizon using its new ATM technology to provide wholesale access to voice as well as data signals in packetized form, which could permit highly efficient loop provisioning.

15. On August 21, 2003, in a wide ranging decision known as the Triennial Review Order, the FCC found that Verizon and other ILECs are not required, as a matter of

federal law or policy, to provide unbundled access to what it calls “packet switching.” See 47 C.F.R. § 51.319(a)(2). This FCC decision was issued before the Department actually moved forward with the further investigation it had announced on May 24 and October 18, 2002.

16. The Department then requested comments regarding whether this FCC decision had any implications for the Department’s planned further investigation in Phase III of Docket 98-57.

The Phase III-D Order’s Finding of Preemption

17. On January 30, 2004, the Department ruled that its investigation of Verizon’s deployment of packetizing technology was preempted by the FCC’s decision. This is the Phase III-D Order from which AT&T now appeals.

18. The Department noted that it has broad power under G.L. c. 159, § 12, to regulate Verizon’s network and services , “to the full extent not preempted by federal law.” Phase III-D Order, at 13. See also G.L. c. 159, § 16 (granting the Department jurisdiction over the regulations, practices, equipment, appliances or service of any common carrier). Indeed, the Department has previously found that it has the power to investigate and regulate the unbundling of and interconnection with

Verizon's network elements under Massachusetts law. See D.P.U. 94-185, Vote to Open Investigation at 3-5 (Jan. 6, 1995).

19. However, the Department went on to rule that it is preempted from exercising its authority under Massachusetts to regulate "packet switching," because the FCC has found that Verizon and other ILECs are not required to offer unbundled wholesale access to "packet switching" as a matter of federal law and policy. See Phase III-D Order at 11-12, 15-17.

20. The Department reasoned that since Verizon is not required to unbundle "packet switching" under the FCC's federal rules, "State mandated unbundling of packet switching under Massachusetts law would not be 'merely inconsistent' with the federal rules in their current form, but would be contrary to them." Phase III-D Order at 15.

Claim of Error

21. The Department's holding that any action by it in this area under Massachusetts law is preempted by the FCC decision not to require unbundling under federal law was incorrect, as a matter of law. It should be vacated pursuant to G.L. c. 30A, § 14(7).

22. Federal requirements like those imposed by the FCC in the Triennial Review Order only set the regulatory floor, and the Department's power to impose additional requirements is not thereby preempted. That is most especially true where, as here, Congress expressly reserves to the States the power to impose additional requirements that go beyond the scope of federal requirements.

23. AT&T is aggrieved by the error of law in the Department's Phase III-D Order.

WHEREFORE, AT&T prays that this Honorable Court vacate the Phase III-D Order of the DTE, declare that the Department's authority to require unbundling of Verizon's network or otherwise to regulate Verizon's wholesale offerings under Massachusetts is not preempted merely because the FCC has declined to impose similar requirements under federal law, and remand the matter to the DTE for further proceedings.

Request for Reservation and Report

For the reasons stated in the accompanying motion, AT&T requests that the Single Justice of the Supreme Judicial Court, Suffolk County, without deciding this matter, reserve for and report to the full Supreme Judicial Court the question of law raised by this appeal.

AT&T Communications of
New England, Inc.,

By its attorneys,

_____

Jeffrey F. Jones (BBO# 253820)
Kenneth W. Salinger (BBO# 556967)
Julia E. Green (BBO# 658730)
PALMER & DODGE LLP
111 Huntington Avenue
Boston, MA 02199-7613
(617) 239-0100

February 19, 2004